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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN CALIFORNIA
San Jose Division**

**BINYAM MOHAMED;
ABOU ELKASSIM BRITEL;
AHMED AGIZA;
MOHAMED FARAG AHMAD
BASHMILAH;
BISHER AL-RAWI**

Plaintiffs,

v.

JEPPESEN DATAPLAN, INC.

Defendant.

Civil Action No. 5:07-cv-02798 (JW)

**PLAINTIFFS' OPPOSITION TO UNITED
STATES' REQUEST FOR A STAY AND
DEFENDANT'S MOTION TO CHANGE
TIME**

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24 **only.**

1 Plaintiffs respectfully request that this Court deny as premature the United States'
2 request for a stay of proceedings, and deny Defendant's motion to alter the stipulated
3 briefing schedule. Defendant Jeppesen Dataplan, Inc., has already signaled that it
4 intends to assert a legal defense by way of dispositive motion. If it does so, then an
5 assertion by the United States of the evidentiary state secrets privilege -- before there is
6 any evidence at issue -- would be premature as a matter of law,¹ and the United States
7 can show no prejudice to its interests. If Jeppesen intends to answer the complaint, then
8 the United States may well have an interest in being party to the proceedings at this
9 stage. Given that Jeppesen's response date is but days away, it is unlikely that it does not
10 know which course it plans to follow. Accordingly, Plaintiffs respectfully request that
11 this Court deny the requests by the United States and Jeppesen and order Defendant
12 either to file a motion to dismiss on the stipulated date, or advise the Court that it intends
13 to answer the complaint. In the event that Defendant elects to forego the filing of a
14 motion to dismiss, Plaintiffs respectfully suggest that the Court set a status conference to
15 discuss the scheduling issues raised by the United States' submissions.

18 I. Statement of Facts

19 Plaintiffs accept as accurate the recitation of facts included in Defendant's
20 Motion to Change Time, at pages 1 and 2, with one addition. When Plaintiffs' counsel
21 informed Defendant's counsel that Plaintiff was unlikely to consent to a modification of
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25 ¹ Plaintiffs acknowledge that *El-Masri v. United States*, 479 F.3d 296 (4th Cir. 2007), is
26 to the contrary. The petition for certiorari in that case is available at
<http://www.aclu.org/safefree/torture/299171gl20070530.html>.

1 the schedule in order to facilitate the United States' premature intervention into the case,
2 Plaintiffs' counsel further suggested that the Plaintiffs might be amenable to a
3 modification in the event that all interested parties agreed jointly to request a status
4 conference to consider the issues raised by the United States' proposed intervention. *See*
5 *Wizner Decl.*, ¶ 4. Defendant's counsel did not respond to this suggestion, but stated that
6 he would report to counsel for the United States the content of the discussion between
7 Plaintiffs and Defendant. *Id.*

9 II. The United States' Proposed Intervention is Premature

10 On August 7, 2007, Plaintiffs and Defendant submitted a stipulation and
11 proposed order setting forth a schedule for Defendant's response to Plaintiffs' First
12 Amended Complaint, as well as for subsequent briefing should that response be a motion
13 to dismiss. *See Collins Decl.*, Ex. B. In presenting the reasons for an extension of the
14 time periods provided by the rules, the stipulation set forth a detailed recitation of some
15 of the "complex legal issues" that would require briefing should Defendant move to
16 dismiss the complaint under Rule 12, including: "whether the nature of Plaintiffs' claims
17 (which are based on alleged U.S. intelligence activities overseas) renders this case
18 nonjusticiable; whether Plaintiffs have alleged a norm of international law that is
19 actionable under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), in light of the
20 standards established by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692
21 (2004); and whether a corporate entity such as Defendant can be held liable under the
22 ATS for alleged violations of international law purportedly committed by agents of, inter
23 alia, the United States, Sweden, Morocco, and Egypt" *Collins Decl.* Ex. B. Three
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1 additional paragraphs of the stipulation are predicated on Defendant's filing of a motion
2 to dismiss, including the summation that "the parties respectfully submit that the
3 proposed schedule set forth below will enable them to fully and fairly brief a motion
4 under Fed. R. Civ. P. 12" *Id.*

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6 Defendant is correct that "none of the previous stipulations that have been filed in
7 this matter have committed the Defendant to filing a motion to dismiss rather than an
8 answer," Def.'s Motion to Change Time at 4, but Defendant does not suggest that it
9 intends to answer the complaint, nor even that it has not yet made up its mind how to
10 respond, less than two weeks from the date on which its response is due. If, as Plaintiffs
11 believe, Defendant intends to file a motion to dismiss, the issues raised will be legal as
12 opposed to factual. There is no reason to stay proceedings to permit the United States to
13 assert an *evidentiary* privilege, or to delay the adjudication of that motion. In
14 considering a motion to dismiss a complaint for failure to state a claim, a court "must
15 accept [plaintiff's] allegations as true." *Hishon v. King & Spalding*, 467 U.S. 69, 73
16 (1984). Accordingly, the United States' central assertion – that, "[a]s a general rule, the
17 United States does not . . . confirm or deny allegations of clandestine intelligence
18 activities," Statement of Interest of the United States, at 3 – cannot be implicated by
19 litigation of a motion to dismiss, where neither the United States nor any other party
20 admits or denies anything.²
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25 ² Defendant offers no explanation for its assertion that "even a motion to dismiss could
26 conceivably contain assertions" that "encroach upon the state secrets privilege." Def.'s
27 Motion at 4.

1 Indeed, the district court in *Arar v. Ashcroft*, 414 F. Supp. 2d 250 (E.D.N.Y.
2 2006), a suit alleging the involvement of U.S. officials in the rendition to torture of a
3 Canadian citizen, had before it several motions to dismiss, including a motion by the
4 United States asserting that the central claims should be dismissed pursuant to the state
5 secrets privilege. The court elected to address the substantive legal motions first:

7 I determined that before addressing the state-secrets privilege, it would be more
8 appropriate to resolve the motions to dismiss the statutory and constitutional
9 claims because it was not clear how the confidentiality of such information could
10 be maintained without prejudicing my ability to hear and fairly respond to
11 plaintiff's arguments. Now that those Counts have been dismissed on other
12 grounds, the issue involving state secrets is moot.

11 *Arar*, 414 F. Supp. 2d at 287.

12 This court should do the same. There is a critical distinction between
13 adjudicating substantive motions to dismiss between the parties, and permitting the
14 United States to move to extinguish a plaintiff's right of access to the courts in the name
15 of the greater good. As courts have recognized, "denial of the forum provided under the
16 Constitution for the resolution of disputes . . . is a drastic remedy." *Fitzgerald v.*
17 *Penthouse Internat'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985). Where, as here, the
18 effect of the United States' premature assertion of the state secrets privilege would be to
19 delay, and potentially circumvent, the adjudication of substantial legal issues involving
20 the enforceability of international legal norms prohibiting torture and enforced
21 disappearances, the equities weigh even more heavily towards permitting the parties to
22 litigate matters that do not, and cannot, implicate state secrets.

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24 Finally, Defendant's efficiency arguments are misplaced. However this case
25 proceeds, it appears that the Court will be considering a motion to dismiss, whether
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submitted by Defendant or by the United States, and it cannot be predicted which course will be the more efficient. Either motion could be granted or denied, as demonstrated by two recent cases in this circuit involving the United States' assertion of the state secrets privilege with respect to classified intelligence programs. *See Hepting v. AT & T Corporation*, 439 F. Supp. 2d 974, 994 (N.D.Cal. 2006) (finding it "premature" to decide which facts were relevant and necessary to claims and defenses "at the present time," and holding that plaintiffs were "entitled to at least some discovery," after which privilege could be assessed "in light of the facts"); *Al-Haramain Islamic Foundation, Inc. v. Bush*, 451 F. Supp. 2d 1215, 1226 (2006) (court was "not yet convinced that [allegedly privileged] information [was] relevant to the case and [would] need to be revealed"). Whether the Court ultimately will adjudicate both motions to dismiss depends on their merits, not on the order of their submission. And Defendant cannot fairly claim prejudice from being compelled to respond to Plaintiff's complaint pursuant to a stipulated schedule: that is, after all, the ordinary course of a civil lawsuit.

CONCLUSION

Based on the current state of the record, neither the United States nor Jeppesen has provided the Court with good reason not to proceed as the parties have already agreed. This Court should not alter the stipulated schedule on the ground that Defendant *might* elect to answer the complaint. Jeppesen should be required to make that decision, as originally agreed, by September 19. In the event that Jeppesen elects to forego filing a motion to dismiss, the Court should set a status conference to resolve the issues raised by the United States' submissions.

Respectfully submitted,

/s/ Ben Wizner

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